

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN C. SEIFERT
Claimant

VS.

O'REILLY AUTOMOTIVE, INC.
Respondent

AND

**AMERICAN CASUALTY COMPANY OF
READING PENNSYLVANIA**
Insurance Carrier

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Docket No. 1,012,672

ORDER

Claimant appeals the March 8, 2006 Award of Administrative Law Judge Steven J. Howard. The Administrative Law Judge (ALJ) denied claimant benefits after finding claimant had not proven that he suffered accidental injury arising out of and in the course of his employment, or that timely notice was provided. Additionally, the ALJ determined claimant had not proven just cause for his failure to provide timely notice. The Appeals Board (Board) heard oral argument on July 18, 2006.

APPEARANCES

Claimant appeared by his attorney, Michael R. Lawless of Lenexa, Kansas. Respondent and its insurance carrier appeared by their attorney, Rex W. Henoch of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ.

ISSUES

1. Did claimant sustain accidental injury arising out of and in the course of his employment with respondent on or about July 6, 2003?
2. Did claimant give timely notice of accidental injury?

3. If not, did claimant prove just cause for his failure to give notice?
4. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be modified with regard to reimbursement from the Kansas Workers Compensation Fund (Fund), but otherwise affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant was employed by respondent as an assistant manager in Gardner, Kansas, when, on July 6, 2003, he suffered an alleged injury. Claimant testified that while carrying two large rotors, he slipped on water, grabbed hold of a rack with his left hand, and proceeded to fall to the ground. Claimant alleges he suffered injuries to his left hip, left arm and neck. Claimant continued working the remainder of the day, completing his normal work duties. He next worked the following Tuesday and Wednesday, completing his work on both days, with Wednesday, July 9, being his last day worked with respondent.

Claimant testified during the regular hearing¹ that he told his supervisor, Scott Hammons, about the accident. However, in his discovery deposition, claimant testified that he did not tell Mr. Hammons or anyone else at respondent's business that he was making a workers compensation claim and he testified that he was unsure of when the first time was that he told anyone at respondent about the accident. At various places in his testimony, claimant stated that he told Mr. Hammons that he had an "incumbrance" or an "oops". But when asked when he first told Mr. Hammons about the slip and fall, claimant could not remember. Claimant admits that he did not request medical treatment from respondent until a letter was sent by his attorney on July 24, 2003. He also acknowledges that he never advised anyone with respondent that he was filing a workers compensation claim.

On or about June 25, 2003, claimant gave notice to respondent of his intent to quit his job. Claimant had obtained a job with Olathe Ford RV. Claimant began his employment with Olathe Ford RV on July 15, 2003. Claimant's duties with Olathe Ford RV were similar to those with respondent, although claimant testified the new job duties were easier than those with respondent. He worked until January 7, 2005, at which time his employment at Olathe Ford RV was terminated due to a conflict with a co-worker.

¹ The Continuation of Regular Hearing held on December 9, 2005.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.

The ALJ, in the Award, found that claimant did not provide timely notice of the accident. Claimant's testimony is diametric. He either did or did not tell Mr. Hammons of the accident, depending on where in the record one looks. He admits he did not request that an accident report be filed, and did not request medical treatment until his attorney sent a claim letter on July 24, 2003. The Board finds that claimant did not prove that he provided timely notice as is required by statute.

K.S.A. 44-520 goes on to say:

The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident

The Board also agrees with the ALJ's finding that claimant failed to prove just cause for his failure to provide timely notice of accident. The Board, therefore, finds the Award of the ALJ denying claimant benefits in the above matter should be modified with regard to the Fund reimbursement, but otherwise is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated March 8, 2006, should be, and is hereby, modified to remove the order directing the Kansas Workers Compensation Fund to reimburse respondent, as that determination belongs to the Director, but is otherwise affirmed.

² K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant
Rex W. Henoch, Attorney for Respondent and its Insurance Carrier
Paula S. Greathouse, Workers Compensation Director